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NOTE:
TO DOMESTIC COURTS WORLDWIDE:
HERE IS WHY YOU CAN DISREGARD THE AUGUST 2018 PARTIAL AWARD FROM THE HAGUE, NETHERLANDS IN THE CHEVRON-ECUADOR LITIGATION

by Lorena Guzmán-Díaz

I. INTRODUCTION

The complexities of the Chevron-Ecuador litigation have enthralled the minds of both scholars and journalists since the dispute began in 1993. Not only has the case challenged courts globally, it has also transfixed the world through headlines fraught with allegations of bribery, fraud, and judicial corruption.[1] The vast canon of literature on this case is testament to the broad scope and far-reaching ramifications of Chevron's and Ecuador's history.[2] This Note examines the Chevron-Ecuador litigation through a specific lens: It dissects and critiques a partial award rendered by an international tribunal at the Permanent Court of Arbitration in The Hague, Netherlands, on August 30, 2018 ("Partial Award"), as well as discusses the implications of that award on investor-state dispute settlement (ISDS) system. Therefore, this Note is uniquely addressed to the domestic courts worldwide faced with this dispute, and it urges the courts to disregard the tribunal's Partial Award.

Multiple courts worldwide[3] have heard the decades-long, multi-billion-dollar case between Chevron Corporation ("Chevron" or "Claimant") and the Ecuadorian

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[1] *See* Manuel A. Gómez, *The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment Outside of Ecuador*, 1 STAN. J. COMPLEX LITIG. 429, 438 (2013) (introducing the Chevron-Ecuador litigation as "the largest, and allegedly one of the most controversial court cases in the history of Ecuador").

[2] *Id.* at 433. *See, e.g.*, Damira Khatam, *Chevron and Ecuador Proceedings: A Primer on Transnational Litigation Strategies*, 53 STAN. J. INT'L L. 249, 251 (2017) (noting that this dispute has been the subject of countless television highlights, newspaper clippings, and law review articles). *See generally* PAUL M. BARRETT, LAW OF THE JUNGLE: THE $19 BILLION LEGAL BATTLE OVER OIL IN THE RAIN FOREST AND THE LAWYER WHO'S STOP AT NOTHING TO WIN (2014); MICHAEL GOLDHABER, CRUDE AWAKENING: CHEVRON IN ECUADOR (2014); JUDITH KIMERLING, AMAZON CRUDE (Susan S. Henriksen, ed. 1991).

[3] *See* Gómez, *supra* note 1, at 449 (Argentina, Brazil, Canada, and the United States). *See also infra* Section II.A (discussing Chevron's history in Ecuador).

plaintiffs from Lago Agrio ("Plaintiffs" or "Respondent").[4]

The Plaintiffs have traversed the globe[5] chasing Chevron's assets since Judge Zambrano-Lozada of the Ecuadorian Provincial Court of Justice of Sucumbios rendered a judgment in favor of the Ecuadorian villagers on February 14, 2011 ("Ecuadorian Judgment").[6] Since 2012, the Plaintiffs have been petitioning domestic courts worldwide to recognize and enforce the $9.5 billion Ecuadorian judgment against Chevron's subsidiaries to achieve restitution for the effects of the pollution left behind in the Lago Agrio region of the Ecuadorian amazon.[7] This pollution was the result of nearly 30 years of oil operations[8] spearheaded by Texaco Petroleum (Texaco), Chevron's subsidiary, in partnership with Petroecuador, Ecuador's state-owned oil company.[9]

Canada is the most recent State to hear the Chevron-Ecuador litigation.[10] As such, this Note traces how the Chevron-Ecuador litigation unfolded in Canada to highlight the proceedings other domestic courts around the world may encounter. On May 23, 2018, the Ontario Court of Appeals affirmed the Superior Court's 2017 finding that Chevron Corporation and Chevron Canada Limited "were two distinct legal entities"

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[4] *See* Chloe A. Snider & Honghu Wang, *The Latest Development in* Yaiguaje v. Chevron Corporation – *The Court of Appeal for Ontario Refuses to Pierce the Corporate Veil*, DENTONS, June 29, 2018, https://www.dentons.com/ en/insights/alerts/2018/june/27/the-latest-development-in-yaiguaje-v-chevron-corporation#_ftn4. *See also* Colin Perkel, *Court Rules Chevron Canada doesn't have to pay US $9.5 billion to Ecuador villagers*, THE GLOBE AND MAIL, May 23, 2018, https://www.theglobeandmail.com/business/ industry-news/energy-and-resources/article-court-rules-chevron-canada-doesnt-have-to-pay-us95-billion-to.

[5] *See* Gómez, *supra* note 1, at 449.

[6] Maria Aguinda v. Chevron Corp., Sentencia definitiva, Corte Provincial de Justicia Sucumbios [Provincial Court of Justice of Sucumbios], Sala Única, Febrero 14, 2011, file 2003-002, at 187 (Ecuador), *available at* https://chevroninecuador.org/assets/docs/2011-02-14-judgment-Aguinda-v-ChevronTexaco.pdf (original February 2011 Ecuadorian Judgment in English).

[7] Gómez, *supra* note 1, at 449.

[8] *See* Megan L. Mah, *An End to The Enforcement Saga*? Yaiguaje v. Chevron Corporation *and the Preservation of the Corporate Veil*, WEIRFOULDS LLP, May 30, 2018, *available at* http://www.weirfoulds.com/Yaiguaje-v-Chevron-Corporation-and-the-Preservation-of-the-Corporate-Veil (explaining the "extensive environmental pollution" surrounding "oil exploration and extraction" projects were "undertaken in the *Oriente* region of Ecuador from 1964 to 1992").

[9] *See* Jason MacLean, *Chevron Corp. v. Yaiguage: Canadian Law and the New Global Economic and Environmental Realities*, 57 CAN. BUS. L.J. 367, 369-70 (2016).

[10] *Id.* at 368 (underlining the historical facts of Chevron in Ecuador from 1964 until 1992).

and that one could not be held liable for the other's debts.[11] On April 4, 2019, the Canadian Supreme Court dismissed the Ecuadorian Plaintiffs' leave to appeal from the Court of Appeals' judgment.[12] Contemporaneously, this same Ecuadorian Judgment was scrutinized by an international tribunal administered by the Permanent Court of Arbitration (PCA) in The Hague, Netherlands.[13] On August 30, 2018, the tribunal rendered its Partial Award,[14] under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules[15] in favor of Chevron. The tribunal found that the Republic of Ecuador, "by the acts of its judicial branch … violated its obligations under Article II(3)(c) of the [United States-Ecuador Bilateral Investment] Treaty, thereby committing international wrongs towards each of Chevron and TexPet."[16] The Award also addressed the 2011 Ecuadorian Judgment, stating that "no part of the said Lago Agrio Judgment should be *recognized* or *enforced* by *any* State with knowledge of the Respondent's said denial of justice."[17]

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[11] *See* Yaiguaje v. Chevron Corp., 2018 ONCA 472 (Can.) (latest development in Canada). *See also* Yaiguaje v. Chevron Corp., 2017 ONSC 135, 136 O.R. (3d) 261 (Can.) (Ontario Superior Court decision ruling against the Ecuadorian Plaintiffs' arguments for piercing the corporate veil). The Superior Court found that because Chevron and Chevron Canada were separate legal entities, "the latter could not be held liable for the debts of the former."

[12] Yaiguaje et al. v. Chevron Corp., 2019 SCC 1, 2 [2019] No. 38183 (Can.).

[13] Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador, Permanent Court of Arbitration, Second Partial Award on Track II (Aug. 30, 2018) [hereinafter "Partial Award"], *available at* https://pca-cpa.org/en/cases/49 (latest decision from tribunal in The Hague).

[14] *See* Press Release, *International Tribunal Rules for Chevron in Ecuador Case*, MARKET WATCH, Sept. 7, 2018, *available at* https://www.marketwatch.com/press-release/international-tribunal-rules-for-chevron-in-ecuador-case-2018-09-07-221595215 (summarizing the tribunal's proceedings and the latest partial award).

[15] The tribunal conducted the arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. *See* UNCITRAL Arbitration Rules (1976), art. 32(1) [hereinafter "UNCITRAL Arbitration Rules"] (defining arbitral awards) ("In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards."). *See generally*, John D. Franchini, *International Arbitration Under the UNCITRAL Arbitration Rules: A Contractual Provision for Improvement*, 62 FORDHAM L. REV. 2223, 2223-29 (asserting that the UNCITRAL rules were developed "to arbitrate international trade disputes between countries with different legal, social, and economic systems"); Charles B. Rosenberg, *Challenging Arbitrators in Investment Treaty Arbitration – A Comparative Law Approach*, 27 J. INT'L ARB. 505, 510-12 (2010) (illustrating ad hoc arbitration under the UNCITRAL Arbitration Rules) ("To avoid the expense of institutional arbitration, many parties opt for ad hoc arbitration, often conducted under the [UNCITRAL] Arbitration Rules. The UNCITRAL Rules are a comprehensive set of procedural rules covering all aspects of the arbitral process.").

[16] Partial Award, *supra* note 13, ¶ 8.8, at 476.

[17] *Id.* at 515 (emphasis added).

As the Plaintiffs continue to pursue enforcement of the Ecuadorian Judgment around the world, the tribunal's Partial Award sets forth critical implications that domestic courts worldwide must examine. Part II of this Note is divided into four background sections. Section A provides a brief overview of Chevron-Ecuador litigation and its procedural background, including a notable 2011 US decision. Section B traces the Ecuadorian Plaintiffs' recognition and enforcement attempts of the Ecuadorian Judgment in Canadian courts to depict what other courts may confront. Section C discusses the framework and scope of the investor-State dispute system, in addition to the relevant law. Section D examines the most recent development in this complex transnational dispute—a Partial Award rendered on August 30, 2018 by an arbitral tribunal in The Hague. Next, Part III dissects the tribunal's August 2018 Partial Award and analyzes the implications of the tribunal's ruling on: (1) the framework and scope of ISDS and (2) the case before domestic courts globally. Furthermore, Part III presents national courts with a solution for whether the Ecuadorian Plaintiffs should be permitted to collect from Chevron's subsidiaries' assets.

This Note illustrates why the tribunal's August 2018 Partial Award rendered in The Hague should be rejected—in short, it is an over-broad international anti-enforcement injunction masqueraded as an arbitral award.

II. BACKGROUND

The US Court of Appeals for the Second Circuit wrote, "[t]he story of the conflict between Chevron and residents of the Lago Agrio region must be one of the most extensively told in the history of the American federal judiciary."[18] This statement from the Second Circuit resonates in numerous jurisdictions and domestic courts. Even before the naissance of the Chevron-Ecuador litigation more than 20 years ago, Chevron and Ecuador had over three decades of tumultuous history that compounded this transnational conflict.

[18] *See Chevron Corp. v. Naranjo*, 667 F.3d 232, 234 (2d. Cir. 2012) (reversing Judge Kaplan's 2011 decision, which granted Chevron an anti-enforcement injunction). *See also* Maya Steinitz & Paul Gowder, *Transnational Litigation as a Prisoner's Dilemma*, 94 N.C. L. REV. 751, 779 (2016) (quoting the Second Circuit's decision reversing earlier ruling granting an anti-enforcement injunction).

A. *The Chevron-Ecuador Litigation: An Overview*

The Chevron-Ecuador litigation stems from pollution and environmental damage to the rivers and rainforests of Ecuador.[19] From 1964 to 1992, Chevron's corporate predecessor,[20] TexPet, and Ecuador's national oil company, Petroecuador, developed exploration and oil extraction operations in the Oriente region of the Amazonian forest. Chevron inherited the suit when it merged with Texaco in 2001.[21] Although the oil development projects stopped in 1992, the remaining residents in the Lago Agrio Region of the Oriente suffered lasting health epidemics.[22] The nearly 30 years of excavation projects resulted in grave oil contamination, loss of natural resources, dislocation, extinction of indigenous groups, and loss of sovereignty.[23]

In 1993, the Lago Agrio Plaintiffs[24] filed a class-action lawsuit in the US District Court for the Southern District of New York[25] claiming a serious public health crisis,

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[19] Steinitz & Gowder, *supra* note 18, at 779.

[20] *See* MacLean, *supra* note 9, at 368 (identifying that Texaco Petroleum Company was Chevron's subsidiary). *See generally* Andrew Ross Sorkin & Neela Banerjee, *Chevron Agrees to Buy Texaco For Stock Valued at $36 Billion*, N.Y. TIMES, Oct. 16, 2000, https://www.nytimes.com/2000/10/16/business/chevron-agrees-to-buy-texaco-for-stock-valued-at-36-billion.html (reporting Chevron's intent to acquire Texaco).

[21] Press Release, FTC Consent Agreement Allows the Merger of Chevron Corp. and Texaco, Inc., Preserves Market Competition, Federal Trade Commission, Sept. 7, 2001, https://www.ftc.gov/news-events/press-releases/2001/09/ftc-consent-agreement-allows-merger-chevron-corp-and-texaco-inc (commenting on the Chevron-Texaco merger). *See, e.g.*, Juan Forero & Steven Mufson, *Chevron Alleges Bribery in Ecuador Suit*, WASH. POST, Sept. 1, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/08/31 /AR2009 083103542.html?noredirect=on (mentioning that Chevron acquired Texaco in 2001); Gómez, *supra* note 1, at 432 (contending that Chevron became involved "in the litigation based on its successor liability stemming from Chevron's acquisition of all of Texaco's assets in 2001").

[22] *See* Khatam, *supra* note 2, at 253 (illustrating the various health problems—skin rashes, memory loss, headaches, miscarriages, birth defects, cancer). *See also* Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, Chevrontexaco, and Aguinda v. Texaco*, 38 N.Y.U. J. INT'L L. & POL. 413, 466 (2006) (identifying the numerous public health concerns after the region's contamination).

[23] *See* Khatam, *supra* note 2, at 252 (discussing the devastating consequences of the pollution on the *Oriente* residents). *See also* Judith Kimerling, *Transnational Operations, Bi-National Injustice: Chevrontexaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador*, 31 AM. INDIAN L. REV. 445, 457 (2007) (establishing that the "[c]ontamination through oil spills and discharge of the 'produced water' destroyed fish, animal[,] and plant lives for hundreds of miles").

[24] *See* Khatam, *supra* note 2, at 254 (specifying that the Plaintiffs were a group of "seventy-six Ecuadorian and twenty-three Peruvian citizens on behalf of the ... 30,000 residents" of the Amazonian region). *See also* Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001), *aff'd as modified*, 303 F.3d 470 (2d. Cir. 2002) (case enjoining two class-action lawsuits brought by the Lago Agrio Plaintiffs).

[25] *See Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002) (recognizing that a group of Ecuadorian

environmental concerns, and additional tort claims. However, the suit was dismissed on grounds of *forum non conveniens* and international comity.[26] As part of the dismissal, Texaco agreed to submit to the jurisdiction of the Ecuadorian courts.[27] By 1995, TexPet "proposed a limited remediation plan to address slightly over one-third of the oil sites but included no obligations to clean up the well and separation sites or any degraded waterways, and no obligations to provide medical treatment to affected local residents."[28] That same year, Ecuador executed the Settlement Agreement[29] between Chevron, Petroecuador, and Ministry of Energy and Mines,[30] where Chevron gave $40 million "for environmental remediation"[31] of the polluted area. This multi-million-dollar plan was meant to satisfy all reparations to the affected areas, as well as to preclude the possibility of future claims against Texaco. However, in 2003, the Ecuadorian Plaintiffs filed their case in Ecuador and asserted their "collective right to a healthy environment" under the Environmental Management Act of 1999 (EMA).[32] Under EMA, the Lago Agrio Plaintiffs represented the affected indigenous

plaintiffs and Maria Aguinda Salazar "filed a class action against Texaco in the South District of New York advancing claims under the ATCA [Anti-Tort Claims Act]"). *See also* Steinitz & Gowder, *supra* note 18, at 780 (offering background information on the US court proceedings).

[26] *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001). *See, e.g.*, *Chevron Corp. v. Naranjo*, 667 F.3d 232, 243-44 (2d. Cir. 2012) ("A decision by a court in one jurisdiction, pursuant to a legislative enactment in that jurisdiction, to decline to enforce judgment rendered in a foreign jurisdiction necessarily touches on international comity concerns."); MacLean, *supra* note 9, at 368 (facilitating historical background on Texaco's history in the Amazonian rainforest before the start of the dispute in 1993).

[27] Khatam, *supra* note 2, at 255 (citing *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 538 (S.D.N.Y. 2001)). *See Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (Chevron agreed to jurisdiction in Ecuador).

[28] *See* Khatam, *supra* note 2, at 253 (citing Barrett, *supra* note 2, at 56).

[29] Settlement Agreement and Release among the Government of Ecuador, PetroEcuador, PetroProducción, PetroComercial, and TexPet, Nov. 17, 1005. *See* Khatam, *supra* note 2, at 254 (highlighting that in 1998, the government of Ecuador "executed the Final release absolving TexPet from liability for environmental impact" during their time in the Lago Agrio region). *See also* Chevron Corp. v. Ecuador, Permanent Court of Arbitration, Claimants' Notice of Arbitration, 4-6 (Sept. 23, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0155_0.pdf (declaring that Texaco was no longer liable for the environmental damage after completion of the Settlement Agreement).

[30] *See* Gómez, *supra* note 1, at 436 ("In September of 2008, the government of Ecuador issued a final release to Texaco, thereby putting an end to any possible reclamations arising out of the consortium activities.").

[31] *See* MacLean, *supra* note 9, at 369 (outlining that Texaco entered into the Settlement Agreement while enforcement proceedings were underway in the US).

[32] Gómez, *supra* note 1, at 433; Ley No. 37. RO/245 de 30 de Julio de 1999, Environmental Management Act of 1999 (Ley de Manejo Ambiental de 1999) (Ecuador) [hereinafter "EMA"].

communities, as opposed to seeking remedies for the individual injuries "inflicted on their own bodies or property."[33] Thus, any remedy that resulted from the litigation would benefit the community, rather than the parties involved.[34] After eight years of litigation, Judge Zambrano-Lozada rendered a judgment against Chevron,[35] finding Chevron liable for $9.5 billion. In 2016, Ecuador's Constitutional Court upheld the Provincial Court's ruling against Chevron, making it the highest court in the State to affirm the 2011 Judgment.[36]

Since the favorable ruling in 2011, the Plaintiffs have targeted Chevron's assets around the globe in an effort to recognize and enforce the Ecuadorian Judgment.[37] As Chevron did not have any assets in Ecuador, the Plaintiffs shifted their focus to Brazil, Argentina, Canada, and the United States.[38] The proceedings in the United States and Canada are the most relevant to the scope of this Note.

1. Enforcement in the United States and Anti-Suit Injunctions

After the Provincial Court rendered a judgment in favor of the Ecuadorian villagers, Chevron sought "a preemptive global anti-enforcement injunction against the Lago Agrio plaintiffs in the US District Court for the Southern District of New

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[33] Gómez, *supra* note 1, at 433. *See*, *e.g.*, Khatam, *supra* note 2, at 255 (underlining that the EMA "created a private right of action for the cost of remediation of environmental arms generally, as opposed to individual damages to specific plaintiffs").

[34] Gómez *supra* note 1, at 433.

[35] *See* MacLean, *supra* note 9, at 369 ("The "Ecuadorian court found Chevron liable for US$8.6 billion in damages and ordered Chevron to pay an additional US$8.6 billion in punitive damages unless it agreed, within 14 days of the order, to apologize. Chevron refused. A final judgement of US$17.2 billion was entered against Chevron, which was subsequently reduced to US$9.5 billion by the Ecuadorian National Court of Justice.").

[36] *Chevron Suffers Major 8-0 Defeat in Ecuador's Constitutional Court Over Landmark Pollution Judgement*, CSR WIRE, Press Release (July 11, 2018, 10:32AM), *available at* http://www.csrwire.com/press_releases/41192-Chevron-Suffers-Major-8-0-Defeat-in-Ecuador-s-Constitutional-Court-Over-Landmark-Pollution-Judgment ("Ecuador's Constitutional Court– which deals only with Constitutional issues–is the third major appellate court in Ecuador and the fourth court overall in the country to uphold the [2011] trial-level decision against Chevron[.] ... Ecuador's highest civil court, the National Court of Justice, already ruled unanimously to affirm the judgment against Chevron.").

[37] *See* Khatam, *supra* note 2, at 271 (commenting on the nature of complex transnational disputes and identifying the multiple parallel proceedings in the Chevron-Ecuador litigation). *See also* Christopher A. Wytock, *Some Cautionary Notes on the "Chevronization" of Transnational Litigation*, 1 STAN. J. COMPLEX LITIG. 467, 474-75 (2013) (distinguishing the breaches of the US-Ecuador BIT).

[38] Gómez, *supra* note 1, at 449.

York, alleging that the Ecuadorian trial court judgment was obtained by fraud."[39] Chevron brought its case to seek a permanent injunction against the Ecuadorian Plaintiffs, as well as their representatives and lawyers, under the Racketeering Influenced and Corruption Organizations Act (RICO).[40]

2. International Anti-Suit Injunction and Source of Law

An international anti-suit injunction is "an instrument by which a court of one jurisdiction seeks to restrain the conduct of litigation in another jurisdiction."[41] This instrument allows for a court to affect the significance and course of litigation abroad.[42] In the Southern District of New York, Chevron invoked the Declaratory Judgment Act and the Recognition Act to seek a permanent injunction that would bar "the enforcement, anywhere in the world outside of Ecuador, of any judgment rendered against [Chevron] by the Ecuadorian courts."[43]

Judge Kaplan ruled on Chevron's requests in 2011 and granted the anti-suit injunction.[44] The numerous tort law and RICO claims granted the New York court jurisdiction over the parties and facilitated Judge Kaplan's ruling in the international anti-enforcement injunction.[45] Moreover, Judge Kaplan invoked the Declaratory Judgment Act in order to exercise jurisdiction and power over the parties. He granted Chevron a worldwide injunction against the Ecuadorian Plaintiffs "pursuant to the

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[39] MacLean, *supra* note 9, at 369.

[40] *See* Khatam, *supra* note 2 at 256 (acknowledging that Chevron brought suit against plaintiffs' attorneys through claims of judicial bribery and fraud). *See also* Gómez, *supra* note 1, at 448 ("The RICO lawsuit was brought against several individuals and business entities, lawyers, consultants, third-party funders, and forty-seven of the Lago Agrio plaintiffs for allegedly seeking 'to extort, defraud, and otherwise tortuously injure plaintiff Chevron' through the use of a 'sham litigation in Lago Agrio, Ecuador.' Through this action ... Chevron not only s[ought] to obtain damages, but a series of permanent injunctions that would preclude co-defendants from enforcing–in the United States and elsewhere–any judgment emanating from the Lago Agrio proceedings in Ecuador.").

[41] *See* George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589, 593 (1990) (discussing anti-suit injunctions in transnational litigation).

[42] *Id.*

[43] *Chevron Corp. v. Naranjo*, 667 F.3d 232, 238 (2d. Cir. 2012).

[44] *See generally Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581 (S.D.N.Y. 2011) (granting global anti-suit injunction in favor of Chevron).

[45] Emily Siederman, *The Recognition Act, Anti-Suit Injunctions, the DJA, and Much More Fun: The Story of the Chevron-Ecuador Litigation and the Resulting Problems of Aggressive Multinational Enforcement Proceedings*, 41 FORDHAM URB. L.J. 265, 267 (2013).

anti-suit injunction analysis articulated in *China Trade & Development v. Choong Yong*."[46]

In *Chevron v. Naranjo*,[47] the US Court of Appeals for the Second Circuit reversed Judge Kaplan's ruling and held that the standard provided in *China Trade & Development* did not apply to the Chevron-Ecuador litigation.[48] The court invoked New York's version of the 1972 Uniform Foreign Country Judgments Recognition Act (the "Recognition Act") to reason that Chevron's requested relief was an anti-enforcement injunction.[49] By invoking the Recognition Act, the Second Circuit found that the Act "did not authorize a court to declare a foreign judgment unenforceable as a preemptive action filed by a putative judgment-debtor."[50] In addition, the Second Circuit held that Chevron and all judgment-debtors could "only challenge a foreign judgment's validity *defensively*, 'as a shield but not as a sword.'"[51]

The Court of Appeals also expressed its concerns for international comity "and held that nothing in the Recognition Act or related case law authorize[d] 'a court sitting in New York to address the rules applicable in other countries, or to enjoin the plaintiffs from even presenting the issue to the courts of other countries for adjudication under their own laws.'"[52] The Second Circuit further noted the Ecuadorians (judgment-creditors) could seek to enforce the judgment from the Ecuadorian court "in any country in the world where Chevron has assets."[53]

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[46] *Chevron Corp. v. Donziger*, 768 F. Supp. 2d at 648 (citing *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d. Cir. 1987)).

[47] 667 F.3d 232, 243 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 423 (2012).

[48] *Id.*

[49] Siederman, *supra* note 45, at 267.

[50] Khatam, *supra* note 2, at 272.

[51] Siederman, *supra* note 45, at 267. ("The Second Circuit concluded that a judgment-debtor could not affirmatively bring an anti-enforcement action against a judgment-creditor when the judgment-creditor has not yet tried to collect on that judgment in the United States, despite declaring its intentions to do so in fora outside the United States.")

[52] Khatam, *supra* note 2, at 272.

[53] *See* MacLean, *supra* note 9, at 369 (quoting *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d. Cir. 2012)). *See also* Khatam, *supra* note 2, at 256 ("The Second Circuit noted, however, that '[t]he relief tailored by the district court, while prohibiting Donziger and the LAP Representatives from seeking enforcement of the Ecuadorian judgment and does not prohibit any of the LAPs from seeking enforcement of that judgment

B. *The Chevron-Ecuador Litigation in Canada: How the Case Unfolded Domestically*

In May 2012, Canada became the first jurisdiction outside of Ecuador where the Lago Agrio plaintiffs endeavored to recognize and enforce the Ecuadorian judgment.[54] The Plaintiffs filed their claim in the Ontario Superior Court of Justice against Chevron and its seventh-level subsidiary, Chevron Canada. Both parent and subsidiary fought the Plaintiffs' recognition and enforcement attempt by bringing motions to stay the Plaintiffs' enforcement action on jurisdictional grounds and to set aside service of the originating process.[55]

The Chevron-Ecuador litigation in Canada examined the corporate law doctrine of piercing the corporate veil by Chevron's jurisdictional challenges asserting "that the corporate entities against which enforcement was being sought were independent from Chevron."[56] Moreover, the oil company argued that Chevron lacked a "real and substantial connection" to the Canadian courts.[57] In September 2015, the Supreme Court of Canada (SCC) exercised jurisdiction over Chevron's claim[58] and held that Canadian courts could affirm jurisdiction over both Chevron Corporation and Chevron Canada. However, SCC emphasized that its finding of jurisdiction did not signify that the Lago Agrio plaintiffs would be successful in enforcing the Ecuadorian Judgment in Canada.[59] The Ecuadorian Plaintiffs, despite being awarded damages in Ecuador, were only allowed to bring a case in the Ontario

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anywhere outside of the United States.'"

[54] Gómez, *supra* note 1, at 449.

[55] *Id.* (clarifying that the Ecuadorian Plaintiffs filed an action against Chevron Canada Limited and Chevron Canada Finance). "The Lago Agrio plaintiffs asserted that, as wholly owned subsidiaries of Chevron and because the same board of directors controlled both entities, the Canadian companies were necessary parties and therefore should be held liable as judgment debtors." *See*, *e.g.*, MacLean, *supra* note 9, at 370.

[56] Yaiguaje v. Chevron Corp. (2013) 118 O.R. (3d) (Can. Ont. C. A.)

[57] *Id.* (asserting that a real and substantial connection is "essential for a Canadian Court to establish jurisdiction").

[58] Mah, *supra* note 8 (analyzing the Supreme Court's 2015 decision).

[59] *See* Dani Bryant & Zach Romano, *Corporate Parent Liability: Litigation Risks for Resource Companies*, FASKEN MARTINEAU: MINING BULLETIN, Dec. 3, 2015, https://www.fasken.com/en/knowledge/2015/12/miningbulletin-20151203/.

courts to seek enforcement of that foreign judgment against the parent company and one of its subsidiaries (Chevron Canada).[60] This ruling established the possibility of enforcing a foreign judgment against the corporate parent of a Canadian subsidiary. Furthermore, given a "*sufficient* relationship" between Chevron Corporation and Chevron Canada, there is no requirement for a *real* and *substantial* connection between foreign parties or proceedings in the Canadian court for the court to enforce a foreign judgment:

> In an action to recognize and enforce a foreign judgment where the foreign court validly assumed jurisdiction, there is no need to prove that a real and substantial connection exists between the enforcing forum and either the judgment debtor or the dispute. It makes little sense to compel such a connection when, owing to the nature of the action itself, it will frequently be lacking. Nor is it necessary, in order for the action to proceed, that the foreign debtor contemporaneously possess assets in the enforcing forum. Jurisdiction to recognize and enforce a foreign judgment within Ontario exists by virtue of the debtor being served on the basis of the outstanding debt resulting from the judgment.[61]

SCC made no further findings about whether a court could pierce the corporate veil to give the Ecuadorian villagers access to Chevron's Canadian assets—all it decided was that the Ontario court possessed jurisdiction to render that decision.[62] Moreover, the court reiterated that its finding of jurisdiction did not indicate that the plaintiffs could successfully enforce[63] the Ecuadorian Judgment in Canada.

The 2015 ruling in *Chevron Corp v. Yaijuage* was met with backlash, as legal critics considered this measure of enforceability to be too liberal because the ruling involved creditors who obtained a judgment in Ecuador, but sought relief in Canada under the same terms.[64] The Supreme Court's decision established transnational litigation risks

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[60] Nancy Kleer, *Canadian courts have jurisdiction to enforce foreign damage awards against Canadian subsidiaries*, OLTHIUS, KLEER TOWNSHEND LLP, https://www.oktlaw.com/canadian-courts-jurisdiction-enforce-foreign-damage-awards-canadian-subsidiaries.

[61] Chevron Corp. v. Yaiguaje, 2015 SCC 42 [2015] S.C.R. 69 (Can.).

[62] Bryan & Romano, *supra* note 59.

[63] *Id.*

[64] Varoujan Arman, *Supreme Court Issues Decision that has Implications for Canadian Subsidiaries, Foreign-Owned Parents*, BLANEY MCCURTHY LLP, Mar. 2, 2016, https://www.blaney.com/articles/supreme-court-issues-decision-that-has-implications-for-canadian-subsidiaries-foreign-owned-

for defendants with any Canadian assets.[65] As "enforcement in Canada can now be pursued against foreign companies and their Canadian affiliates even if neither party to the original dispute has a 'real and substantial' connection to Canada," and the Supreme Court's decision has significant cross-border implications.[66] If the Lago Agrio plaintiffs were successful "in their claim to levy execution on the assets of the judgment[-]debtor, they would simply seize the shares of Chevron Canada as an asset of Chevron Corporation."[67] Chevron Canada's shares could then be sold "to satisfy the judgment the plaintiffs had obtained against Chevron Corporation."[68]

The Canadian Supreme Court "emphasized that Canada takes a generous and liberal approach to recognition and enforcement proceedings"[69] and focused on the importance of international comity. Furthermore, the court asserted:

> [T]here is no requirement for a connection between the substance of the dispute and the new jurisdiction where enforcement is sought. The enforcing court only needs proof that the judgment was issued by a court of competent jurisdiction, is final, and proof of its amount. There is no requirement for a debtor to have assets in Canada at the time enforcement is sought.[70]

Despite its perceived liberal approach regarding enforceability, the Supreme Court of Canada also highlighted that even though it may possess jurisdiction over the recognition and enforcement proceedings, the court is not obligated to exercise

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parents.

[65] *Id.*

[66] Brandon Kain et al., *Chevron Corp. v. Yaiguaje: SCC Decision Highlights Increased Litigation Risk for Canadian Companies for Misdeeds of their Foreign Affiliates*, MCCARTHY TETRAULT, Sept. 8, 2015, https://www.mccarthy.ca/en/insights/articles/chevron-corp-v-yaiguaje-scc-decision-highlights-increased-litigation-risk-canadian-companies-misdeeds-their-foreign-affiliates.

[67] Angela Swan, *The Elephant in the Room: How 'Piercing the Corporate Veil' Led the Court Astray in Yaiguaje v. Chevron Corporation*, AIRD & BERLIS BLOG, Apr. 26, 2018, https://www.airdberlis.com/insights/blogs/firmblog/post/fb-item/the-elephant-in-the-room-how-piercing-the-corporate-veil-led-the-court-astray-in-yaiguaje-v.-chevron-corporation.

[68] *Id.*

[69] Kevin O' Callaghan & Zach Romano, *SCC: Courts May Enforce Foreign Pollution Awards*, FASKEN MARTINEAU: CORPORATE SOCIAL RESPONSIBILITY BULLETIN, Sept. 17, 2015, https://www.fasken.com/en/knowledge/2015/09/corporatesocialresponsibilitylawbulletin-20150917/.

[70] Arman, *supra* note 64.

that jurisdiction.

In 2017, the Plaintiffs sought the enforcement of the Ecuadorian Judgment. That year, the Ontario Superior Court granted summary judgment in favor of Chevron Canada.[71] The court "upheld the separate legal personality of parent and subsidiary corporations and declined to 'pierce the corporate veil' to allow the plaintiffs to seize the Canadian subsidiary's assets in order to satisfy their judgment against the parent company."[72] On May 23, 2018, the Ontario Court of Appeals affirmed the Superior Court's 2017 decision that Chevron and Chevron Canada were separate legal entities. Despite the court's decision in 2015 suggesting that "Canadian courts should take a generous approach in finding *jurisdiction* to allow litigants holding foreign judgments to bring enforcement actions in Canada, the Court of Appeals' [May 2018] decision … demonstrates that *procedural* matters related to such actions will not necessarily be afforded such a generous approach."[73] The decision by the Court of Appeals demonstrates that certain procedural matters, like an award of security for costs, "should not be treated differently solely because the main action concerns the enforcement of a foreign judgment."[74] Although the plaintiffs' lawyers applied for leave to appeal the Ontario Court's ruling, on April 4, 2019, the Canadian Supreme Court dismissed their application with costs,[75] refusing to pierce the corporate veil in favor of the Ecuadorian Plaintiffs.

C. *The Structure and Scope of Investment Treaty Disputes*

Since the early 1990s, the system of investor-state dispute settlement has expanded due to an increasing commitment by States to enter into international investment agreements ("IIAs"), such as bilateral investment treaties (BITs) and

[71] Stephen Brown-Okunlik & Robert Wisner, *No Easy Way Around Separate Corporate Personality: Ontario Court Relesases its Decision in* Yaiguaje v. Chevron, MCMILLAN LLP LITIGATION BULLETIN, Feb. 2017, https://mcmillan.ca/No-Easy-Way-Around-Separate-Corporate-Personality-Ontario-Court-Releases-its-Decision-in-Yaiguaje-v-Chevron.

[72] *Id.*

[73] Mah, *supra* note 8 (emphasis added).

[74] *Id.*

[75] Yaiguaje et al. v. Chevron Corp., 2019 SCC 1, 2 [2019] No. 38183 (Can.).

multilateral treaties with other States.[76] These treaties allow States "to attract foreign investment by granting broad investment rights to foreign investors and creating flexibility."[77] IIAs between two or more States create substantive rights for foreign investors, which in turn protect international investments.[78] Moreover, they "grant reciprocal investment rights–of a procedural and substantive nature–to foreign investors from the signatory countries."[79] After satisfying specific prerequisites, "IIAs permit investors to initiate arbitration directly against a state."[80] This procedure is known as investment treaty arbitration (ITA).[81]

Investment treaty arbitration "permits investors to vindicate substantive treaty rights that states granted to investors by directly suing states for government conduct that allegedly breached a treaty and created an adverse effect on a foreign investment."[82] Moreover, ITA provides "investors with a direct forum for depoliticized adjudication that is conducted by arbitrators who are required to be independent and impartial and generate an enforceable award."[83]

D. *Arbitral Award Rendered on August 2018 in Favor of Chevron*

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[76] *See* Susan D. Franck & Lindsey W. Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L.J., 459, 461–63 (2015).

[77] Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing International Public Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1521 (2005) [hereinafter Franck, *Legitimacy Crisis*].

[78] *See* Franck & Wylie, *supra* note 76, at 462 (commenting that the substantive rights granted to foreign investors include "the right to compensation for government expropriation and freedom from discrimination, to people or entities investing abroad"). *See also id.*, at 470 n.43-45 (discussing substantive rights in IIAs).

[79] *Id.* at 470.

[80] *Id.* at 470, 473 (delineating the mechanics of ITA).

[81] *Id.* at 461 (remarking that governments worldwide are "focusing on how to best use bilateral and investment treaties as strategies to increase their economic prosperity"). *See e.g.*, Catherine Titi, *The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration*, 14 J. WORLD INVEST. & TRADE 829, 830 (2013) (stating that the "system of investment dispute resolution has taken the [center] stage and has been placed in a unique position from which to formulate international investment law"); Charles N. Brower & Sadie Blanchard, *What's in a Meme? The Truth About Investor-State Arbitration: Why It Need Not and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT'L L. 689, 706–08 (2014).

[82] Franck & Wylie, *supra* note 76, at 469.

[83] *Id.* at 472 (exploring the doctrines and policies underlying ITA); *see, e.g.*, Susan D. Franck, *Empirically Evaluating Claims about Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 3–7 (2007) (providing "an overview of ITA doctrine and arbitration mechanics").

On August 30, 2018, an international arbitral tribunal administered by the Permanent Court of Arbitration in The Hague rendered a 521-page Partial Award in favor of Chevron,[84] concluding that Ecuador "wrongfully committed a denial of justice under the standards both for fair and equitable treatment [(FET)] and for treatment required by customary international law"[85] under Article II(3)(a) of the Ecuador-US BIT ("Ecuador-US Treaty" or "Treaty") signed in 1997.

On September 5, 2018, the world became privy to the tribunal's ruling, which holds Ecuador liable for violating Chevron's "fundamental procedural rights"[86] "by rendering decisions enforceable, maintaining the enforceability, executing the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) and knowingly facilitating its enforcement outside Ecuador."[87] Furthermore, the Partial Award states that the Ecuadorian Judgment "is contrary to international public policy[,] and no part of said Lago Agrio Judgment should be *recognized* or *enforced* by *any* State with knowledge of the Respondent's said denial of justice."[88] The tribunal will hold a trial in the following months to assess the damages Ecuador must pay Chevron.[89]

This Partial Award is the most definitive affirmation of Ecuador's culpability in this complex transnational dispute in nearly 30 years of litigation before multiple courts.[90]

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[84] *See* Press Release, Chevron Corp., International Tribunal Rules for Chevron in Ecuador Case, Sept. 7, 2018, https://www.chevron.com/stories/international-tribunal-rules-for-chevron-in-ecuador-case (stating that Ecuador was "found liable for violating international law, [and] supporting fraud and corruption").

[85] Partial Award, *supra* note 13, at 513–14, ¶ 10.5.

[86] *Id.* at 514, ¶ 10.10.

[87] *Id.* ¶ 10.5.

[88] *See id.* at 515, ¶ 10.10 (alteration in original) (emphasis added). *See also* Todd Tucker, *Chevron v. Ecuador decision: Breaking Bad or Breaking ISDS?*, MEDIUM, Sept. 11, 2018, *available at* https://medium.com/@toddntucker/chevron-v-ecuador-decision-breaking-bad-or-breaking-isds-c3e3a91144bf (comparing the arbitral tribunal's award with the 2016 US appellate decision, "which predictably remove[d] Donziger from his ability to profit from the case, without limiting … plaintiffs from pursuing justice and without telling other countries' courts what to do").

[89] *See* Partial Award, *supra* note 13, at 476, ¶ 8.9 (examining that "[a]s with Chevron, issues as to reparation for any injury in the form of compensation claimed by TexPet are currently assigned to Track III" of the Tribunal's arbitral proceedings).

[90] *See* Tucker, *supra* note 88 (interpreting the tribunal's August 2018 Partial Award).

The tribunal found that the Judgment issued against Chevron in the Ecuadorian Provincial Court was obtained through bribery, corruption, and fraud. Moreover, it asserted that the 2011 Ecuadorian Judgment was based on claims that Chevron had already settled and been released of responsibility by Ecuador years earlier. The tribunal's August 2018 Partial Award summarizes the "overwhelming" evidence of the Ecuadorian Plaintiffs' legal team's corruption and fraud in Ecuador:

> The Tribunal concludes that the Lago Agrio Judgment (with the judgments of the Lago Agrio Appellate, Cassation and Constitutional Courts) violates international public policy. In the Tribunal's view, the reinstatement of the Claimants' rights under international law requires of the Respondent the immediate suspension of the enforceability of the Lago Agrio Judgment and the implementation of such other corrective measures as are necessary to 'wipe out all the consequences' of the Respondent's internationally wrongful acts, so as to re-establish the situation which would have existed if those internationally wrongful acts had not been committed by the Respondent.[91]

The tribunal focused on Ecuador's "internationally wrongful acts"[92] and held the Respondent accountable for "issuing, rendering enforceable, maintaining the enforceability[,] and executing"[93] the Ecuadorian Judgment after "material parts of the Lago Agrio Judgment of 14 February 2011 … were corruptly 'ghostwritten' for Judge Nicolás Zambrano[-]Lozada" while he was serving as a judge at the court in Sucumbios.[94] In addition, the tribunal found that there is sufficient evidence to conclude that the Judgment was tampered with "by one or more of the Lago Agrio Plaintiffs' representatives in return for a promise to pay Judge Zambrano a bribe from the proceeds of the Lago Agrio Judgment's enforcement by the Lago Agrio Plaintiffs."[95]

The tribunal did not interfere in the rulings of the Ecuadorian courts but found

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[91] Partial Award, *supra* note 13, at 497–512 (addressing "the claimant's and respondent's material requests for relief").

[92] *Id.* at 516.

[93] *Id.*

[94] *Id.* at 513, ¶ 10.4.

[95] *Id.*

the Ecuadorian Judgment to be procedurally illegitimate under international law. The tribunal noted that the Judgment "exists as a concrete fact under Ecuadorian law … [and] [g]iven such existence, the Lago Agrio Judgment has a legal effect and resulting consequences under international law."[96] Therefore, granting the remedy of annulment is within the scope of "the Respondent's internal law."[97] Regardless, the tribunal asserted that it had "the power to order [Ecuador] to take steps to secure that result."[98] The tribunal declared:

> [D]enial of justice under the Treaty's FET standard equates to denial of justice under customary international law, both falling within the scope of Article II(3)(a) of the Treaty … [therefore,] [i]t follows that the Tribunal's finding regarding denial of justice under the FET standard equates with finding the Respondent also in breach of its obligations under customary international law for denial of justice.[99]

Under the standards set forth in the Ecuador-US Treaty and under customary international law, "the Respondent (by its judicial branch) was obliged not to hold Chevron … liable under the Lago Agrio Judgment; and consequently the Claimants are, as a matter of international law, not obliged to comply with the Lago Agrio Judgment."[100] The tribunal unanimously absolved Chevron of liability by rendering this Partial Award.

III. ANALYSIS

The tribunal extended its jurisdictional power beyond the investor and the State exclusively parties to the investment treaty arbitration when it found the Ecuadorian Judgment to be a violation of international public policy and that therefore, "no part of the said Lago Agrio Judgment should be *recognized* or *enforced* by *any* State." In the realm of ITA, "arbitral interpretation is not intended to establish rules that reach

[96] *Id.*

[97] *Id.*

[98] *See id.* at 500-01, ¶ 9.13 (holding that the Tribunal has the same power as the ICJ did in that case—it has the power to order the Respondent to take steps to secure the desired result).

[99] *Id.*

[100] *Id.*

beyond the dispute at hand."[101] As the tribunal exceeded its jurisdictional power and rendered an award that goes beyond the scope and framework of the investor-state dispute settlement system (ISDS), this Note argues that domestic courts worldwide should disregard the August 2018 Partial Award.

A. *The Award Goes Beyond the Scope of ISDS*

The Partial Award exceeds the scope of both the investor-state dispute settlement system (ISDS) and the tribunal's jurisdiction over Chevron and Ecuador. The tribunal sought to implicate international public policy violations upon other jurisdictions if any national court recognizes or enforces the 2011 Ecuadorian Judgment. Consequently, the Partial Award poses the problem of arbitrators exceeding the scope of their jurisdictional power beyond the arbitration, in addition to challenging the systemic underpinnings of the ISDS model because it intrudes far too deeply into judicial proceedings. The tribunal's Partial Award exceeds "the foundational normative arrangement that [holds together] the contemporary international investment system."[102] As such, the Partial Award invites a holistic rethinking ITA tribunal's expansion of power and jurisdiction to judicial proceedings in foreign states.

The Partial Award demonstrates the "great need for systemic [and] institutional solutions."[103] As arbitrators are the "central actors" in transnational dispute resolution, they oversee billion-dollar disputes, make decisions implicating international law, and "play a vital role in the global economy."[104] The tribunal's Partial Award highlights some of the difficulties in the current ITA framework. Although "foreign investment is a vital tool for economic development and global prosperity,"[105] there are many institutions that "complain about particular aspects of the investment treaty process, including … [the] subsequent impact of sovereignty."[106]

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[101] Titi, *supra* note 81, at 830.

[102] *Id.*

[103] Steinitz & Gowder, *supra* note 18, at 754 (calling for structural solutions within transnational disputes).

[104] Franck, *Inside the Arbitrator's Mind*, 66 EMORY L. J. 1115, 1116 (2017).

[105] Franck, *Legitimacy Crisis*, *supra* note 77, at 1524.

[106] *Id.* at 1586.

B. *Implications on Domestic Courts Around the Globe*

When the tribunal stated that no part of the Ecuadorian Judgment "should be *recognized* or *enforced* by *any* State," the tribunal echoed Judge Kaplan's 2011 grant of a global anti-suit injunction in favor of Chevron. Similarly, the tribunal's Partial Award inflicts damage on international comity[107] and the principle of sovereignty.[108] According to the Partial Award, if any domestic court globally enforces the Ecuadorian Judgment against Chevron and allows the Ecuadorian Plaintiffs to recover Chevron's assets, that State would be in violation of international public policy.

By ruling that the Ecuadorian Judgment should neither be *recognized* nor *enforced* by *any* State, the 2018 Partial Award is inherently a global anti-enforcement injunction disguised as an arbitral award. As arbitrators are exceeding the scope of investor-state disputes, the "rise of arbitral power over courts brings greater urgency to the broader debates over the legitimacy of investor arbitration."[109]

1. Comparing the tribunal's Partial Award to Judge Kaplan's 2011 Ruling

The tribunal's overbroad ruling is analogous to Judge Kaplan's 2011 ruling in *Chevron Corp. v. Donziger*,[110] granting an international anti-suit injunction (later

[107] *See generally* John Kuhn Bleimaier, *The Doctrine of Comity in International Law*, 24 CATH. LAW. 327, 327 (1979) (providing a definition for international comity) ("The doctrine of comity is the legal principle which dictates that a jurisdiction recognizes and gives effect to judicial decrees and decisions rendered in other jurisdictions unless to do so would offend its public policy.").

[108] *See* Kyle Bagwell & Robert W. Staiger, *National Sovereignty in an Interdependent World*, NBER Working Paper Series on International Trade and Investment (2004), *available at* https://www.nber.org/papers/w10249.pdf (defining sovereignty as the "norm of non-intervention in the internal affairs of other states). "[N]ational sovereignty is a complex notion, reflecting a number of different features. ... [There is increasing tension] between national sovereignty and international objectives." *See generally* Jenik Radon, *Sovereignty: A Political Emotion, Not a Concept*, Comment, 40 STAN. J. INT'L L. 195 (Summer 2014) (commenting on the challenges in finding a workable definition for the notion of "sovereignty").

[109] *See* Michael D. Goldhaber, *The Rise of Arbitral Power over Domestic Courts*, 1 STAN. J. COMPLEX LITIG. 373, 376 (2013) ("supervising an independent state judiciary so as to confer rights that transcend domestic law, arguably without the specific consent of the state, seems well-calculated not only to be ignored, but also to inspire backlash to the worthy project of investor-state arbitration."). *See also* Franck, *Legitimacy Crisis*, *supra* note 77, at 1556 n.137 (citing Noah Rubins, *Judicial Review of Investment Arbitration Awards*, *in* NAFTA INVESTMENT LAW & ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS 354, 375 (Todd Weiler ed., 2004)) ("[I]nvestment awards are often colored by issues of sovereignty and political ideology, and may be accompanied by domestic political pressure compelling Sovereigns to challenge awards.").

[110] *Supra* note 46, 768 F. Supp. 2d 581.

found to be an anti-enforcement injunction) "allegedly prohibiting *any* court in *any* nation from enforcing the environmental judgement against Chevron."[111] In September 2012,[112] the US Court of Appeals for the Second Circuit reversed Judge Kaplan's injunction and "chastiz[ed] Kaplan for inflicting damage on international comity[−]the principle among modern nations to show respect for each other's legal systems."[113] The Second Circuit stated:

> [W]hen a court in one country attempts to preclude the courts of every other nation from ever considering the effect of that foreign judgment, the comity concerns become far graver. In such an instance, the court risks disrespecting the legal system not only of the country in which the judgment was issued, but also those of other countries, who are inherently assumed insufficiently trustworthy to recognize what is asserted to be the extreme incapacity of the legal system from which the judgment emanates. The court presuming to issue such an injunction sets itself up as the definitive international arbiter of the fairness and integrity of the world's legal systems.[114]

Although the tribunal's Partial Award does not specifically address the any domestic court, "that anti-suit injunctions are addressed to [the parties] within the jurisdiction of the enjoining court[,] … . rather than directly to the foreign court where the proceedings are at issue, does not substantially lessen the element in conflict."[115] Just as the District Court opinion did not address "the legal rules that would govern the enforceability of an Ecuadorian judgment under the laws"[116] of other jurisdictions, neither does the tribunal's Partial Award.

The issuance of international anti-enforcement injunctions poses a challenge to the doctrines of national sovereignty and international comity. As each State adheres

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[111] Rey Wexler, *Chevron's SLAPP suit against Ecuadorians: corporate intimidation* (May 11, 2018), https://www.greenpeace.org/international/story/16448/chevrons-slapp-suit-against-ecuadorians-corporate-intimidation (emphasis added) (interpreting Chevron's defense tactics through the lens of corporate criticism).

[112] *Supra* note 43 (holding that Ecuadorian Plaintiffs could enforce in any country where Chevron had assets).

[113] Wexler, *supra* note 111.

[114] *Supra* note 43.

[115] Bermann, *supra* note 41, at 589.

[116] *Chevron v. Naranjo*, 667 F.3d at 244.

to their own courts and judiciaries, a sizeable problem arises regarding "injunctions prohibiting the commencement or continuation of foreign judicial proceedings."[117] If these injunctions were to become the norm, "the regularity with which a change of forum in the international area [would] mean a corresponding change in applicable law suggests only a heightened potential for conflict over the anti-suit injunction compared to the sister-state setting, without any obvious solution."[118] Due to the sensitivities "involved in assessing the advantages and inconveniences of foreign litigation, as well as the absence of any mechanism for containing recriminations that are likely to follow from some of those assessments," foreign courts cannot deploy international anti-suit injunctions nor anti-enforcement injunctions.[119]

Despite anti-suit injunctions finding "their greatest utility in the international setting, it is also in that [same] setting that they have their greatest capacity for mischief."[120] A court should be slow to exercise its jurisdiction "so as to interfere with the pursuit of foreign proceedings," as a matter of judicial comity.[121] Internationally, relations are "more apt to be disturbed," especially by the "apparent interference" in the judiciary of a State.[122] This interference "with a foreign country's exercise of adjudicatory authority has a potential for embarrassing the political branches of government and disturbing" international relations.[123]

International anti-enforcement injunctions are still speculative in the context of ISDS. The Partial Award asserts its arbitral control over the members of the investor-state arbitration, as well as on unrelated foreign jurisdictions' national courts through the lens of an investment treaty arbitration. When the tribunal rendered a ruling with effects on parties and jurisdictions beyond the scope laid out within the practice of investor-State disputes, the tribunal overstepped its authority. This fundamentally

[117] Bermann, *supra* note 41, at 589.

[118] *Id.* at 620.

[119] *Id.*

[120] *Id.*

[121] Louis Flannery, *Anti-Suit Injunctions in Support of Arbitration*, 14 EUR. BUS. L. REV. 143 (2003).

[122] *Id.*

[123] Bermann, *supra* note 41, at 604.

improper Partial Award has direct implications on a State's compliance with international public policy and threatens States' sovereignty. Moreover, the Partial Award contains arbitral directions commandeering the decision of national judges under threat of international public law violations.

The tribunal's Partial Award is a poignant example of how "investment tribunals are far more willing than domestic courts to assert control over a foreign court, and do so with increasing frequency."[124] In the Chevron-Ecuador arbitration, the tribunal is, in essence, ruling on behalf of jurisdictions not within the scope of the investor-state dispute. However, an innate consequence of this anti-enforcement injunction is that when an international anti-enforcement injunction "is directed at a state, it imposes obligations not only on the executive acting as litigant, but … on the state's judiciary."[125] In the context of domestic courts worldwide potentially facing the Chevron-Ecuador litigation, the tribunal's Partial Award is an international anti-enforcement injunction "amount[ing] to an arbitral suspension of judicial proceedings."[126] It is worth noting that the investor-state dispute at the Permanent Court of Arbitration involved only Chevron Corporation, Texaco, and the Republic of Ecuador. Therefore, the theoretical scope of the tribunal's Partial Award and the award's ramifications should remain within the tribunal's jurisdiction, and the award should solely impact the parties belonging to the investor-state dispute. Despite the Partial Award's potential to function as an anti-enforcement injunction, it is questionable whether or not the tribunal has any basis to affect a jurisdiction separate from the three parties it oversaw in the arbitration.

As the tribunal acted outside its jurisdiction and beyond the scope of the investment treaty arbitration, domestic courts globally should ignore the implications of the Partial Award when deciding whether to enforce the Ecuadorian Judgment as

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[124] *See* Goldhaber, *supra* note 109, at 374 (remarking on the lack of literature analyzing how "arbitrators might control judges") ("The unique strength of arbitral power over courts has been dramatically demonstrated in Chevron's epic dispute over oil pollution in Ecuador.").

[125] *See id.* at 375 (tracing the historical development of the anti-suit injunction from medieval times through its contemporary use in investment-treaty arbitration).

[126] *Id.*

it pertains to potential collection of Chevron's subsidiaries' assets. The tribunal's overextension of jurisdiction in this Partial Award cannot be as easily ignored. It underscores an important criticism of the investor-State dispute settlement system and implores a reconsideration of the scope of ISDS and the jurisdictional limits of an arbitral tribunal.

C. *Solution for Domestic Courts Worldwide*

Although the tribunal's Partial Award does not specifically address domestic courts, by stating no part of the Ecuadorian Judgment should be "*recognized* or *enforced* by *any* State[,]" the Tribunal directly intends to extend its jurisdictional power to national courts worldwide. The tribunal overextended its jurisdiction and went beyond the scope of the investor-state dispute. Despite the tribunal's Partial Award pleading domestic courts not to enforce the 2011 Judgment, this Note does not support the tribunal's procedural transgression and overextension of its jurisdictional powers. The tribunal's Partial Award is thus not relevant to any pending domestic proceedings involving the enforcement of the Ecuadorian Judgment. While the tribunal may be willing to go beyond the scope of ISDS, domestic courts worldwide should respect procedure and encourage arbitrators in the ISDS realm to follow its lead.

IV. CONCLUSION

Throughout the Chevron-Ecuador litigation, "the unique strength of arbitral power has been dramatically demonstrated."[127] The 2011 Ecuadorian Judgment "has revealed the complexity of the multilayered, multistep process of enforcing a foreign judgment across different jurisdictions."[128] This Note implores domestic courts around the globe and the international law community to question the ISDS system, an arbitral tribunal's power to award international anti-enforcement injunctions, and an arbitrator's control over foreign judicial proceedings, along with their effects on national sovereignty and international comity.

Any State's ruling in this case will elicit substantial backlash—no matter the

[127] *Id.* at 374.

[128] Gómez, *supra* note 1, at 433.

decision. And more poignantly, even a decision that favors Ecuador hardly suffices to repair the damage that have been done. This is a case where, unfortunately, victims of environmental pollution will not likely be able to recover under an Ecuadorian Judgment obtained through fraud and judicial bribery by their own representatives. Moreover, as the Ecuadorian Judgment was brought under the EMA, the individuals were never going to recover for the harms they endured.

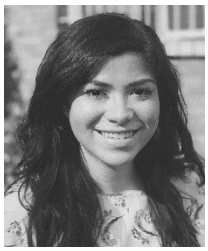
This dispute has become so complex that it involves BITs, multiple domestic courts, and numerous lawsuits. The case is now too far removed from the Ecuadorian Plaintiffs; it has morphed into a ubiquitous media story of the oil conglomerate spending billions to defend itself against the Plaintiffs' lawyer who bribed Judge Zambrano-Lózada in Ecuador.[129] The Ecuadorian Plaintiffs have been overshadowed in discussions and taken out of the narrative.

The tribunal's ruling precludes domestic courts from autonomy over their own jurisdiction and dooms any actions taken in favor of Plaintiffs to be a violation of international public policy. As demonstrated by the Canadian proceedings, Canada is not in violation of international public policy by allowing Plaintiffs to recognize the 2011 Judgment in Canadian courts.

The August 2018 Partial Award is a symbol for the overextension of power that has become a problem in investment treaty arbitration. The tribunal's finding sheds light on problems within ISDS and implores reconsideration of the scope of an arbitral tribunal's jurisdiction. This Partial Award blurs the lines between enforcing a foreign judgement in a national court and enforcing an investor-state award that expands beyond the scope of the ITA by holding other states to be in violation of international law—far beyond the jurisdiction of the arbitration between the State and the private investor. As such, the tribunal's Partial Award is questionably sound and arguably

[129] Emma Cueto, *Donziger Held in Contempt in $9.5B Chevron Ecuador Fight*, Law360 (May 23, 2019), https://www.law360.com/internationalarbitration/articles/1162725/donziger-held-in-contempt-in-9-5b-chevron-ecuador-fight?nl_pk=943e32d6-ea73-4e41-bbe5-9b44e6e3955f&utm_source=newsletter&utm_medium=email&utm_campaign=internationalarbitration&read_more=1 (noting that Steven Donziger, the Plaintiffs' lawyer, "helped secure a fraudulent $9.5 billion judgment against Chevron Corp. in Ecuador ... [and] blatantly ignored the court's orders forbidding him from profiting from the award").

irrelevant to how domestic courts around the globe decide if faced with the Chevron-Ecuador litigation.



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INSTITUTE FOR TRANSNATIONAL ARBITRATION
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